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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 254

DORIS SHIPMAN HUNTEMAN, Individually and as Guardian, Etc.,

Petitioner,

versus

NEW ORLEANS PUBLIC SERVICE INC.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

WILLIAM W. OGDEN,
Counsel for Respondent and Appellee.

ALVIN R. CHRISTOVICH,
Of Counsel for Respondent and Appellee.

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To the Honorable the Supreme Court of the United States:

This brief on behalf of New Orleans Public Service Inc., respondent and appellee below, is filed in opposition to the petition of Doris Shipman Hunteman, individually and as Guardian, Etc., for writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

1.

STATEMENT OF THE MATTER INVOLVED.

The statement of the matter involved contained in the petition for writ of certiorari by Doris Shipman Huteman is a correct statement.

2.

A SUMMARY DISCUSSION OF THE REASONS RELIED UPON BY PETITIONER FOR ALLOWANCE OF THE WRIT.

The United States Circuit Court of Appeals for the Fifth Circuit dismissed the appeal herein, for lack of finality of judgment necessary to confer jurisdiction upon that Court, on the authority of *Menge v. Warriner*, 120 Fed. 816; *General Electric Co. v. Allis-Chalmers Co.*, 194 Fed. 413, and *Hohorst v. Hamburg American Packet Co.*, 148 U. S. 262, 13 S. Ct. 590, 37 L. Ed. 443, and other authorities cited in the opinion which is reported in 119 Fed. (2d) 465.

The fundamental question, whether the judgment appealed from was a final one within the meaning of the rule, was one which would suggest itself to the Court, and respondent and appellee feeling that it was its duty to raise the question, did so by motion to dismiss the appeal. *Collins v. Miller*, 252 U. S. 364, 40 S. Ct. 347, 64 L. Ed. 616; *Defiance Water Co. v. Defiance*, 191 U. S. 184, 194, 48 L. Ed. 140, 144, 24 S. Ct. 63.

The first ground upon which petitioner relies for allowance of the writ is the suggestion that the appellate

jurisdiction of the United States Circuit Courts of Appeal should be reappraised and clarified in view of the adoption of the Federal Rules of Civil Procedure.

As was pointed out by Judge Holmes, in the opinion of the Court herein, the Federal Rules of Civil Procedure are not intended to affect either the jurisdiction of the District Courts with whose procedure they deal, nor the jurisdiction of the Appellate Courts to which they are not directed. *Rule 82 of the Federal Rules of Civil Procedure.* A treatment of this question in detail will be found in *Moore's Federal Practice*, Vol. 3, pages 3155, et seq., and at pages 66, et seq., 1940 supp.

In that connection petitioner cites *Rule 54 (b) of the Federal Rules of Civil Procedure* permitting judgment at various stages. She suggests that the rule applied in *Karl Kiefer Machinery Co. v. U. S. Bottlers Machine Co.*, 108 Fed. (2d) 469, and *Collins v. Metro-Goldwyn Pictures Corporation*, 106 Fed. (2d) 83, should be followed in the case under argument. There, however, appeals were taken from orders of dismissal on separable claims or perhaps separable causes of action. Be that as it may, the Court itself, in our opinion, in the *Collins* case distinguished the kind of a situation which prevailed there and in the *Kiefer* case from the one under argument. In *Atwater v. North American Coal Corporation, et al.*, 111 Fed. (2d) 125, in discussing possible application of the *Collins* case to such a situation as we have here, the Court said:

> "The situation in *Collins v. Metro-Goldwyn Pictures Corporation* was different. That was not a case where the dismissal touched some but not all defendants."

The second and third grounds upon which petitioner relies touch each other and seem to suggest a conflict in the decisions of the various Circuit Courts of Appeal upon the subject matter involved, and lack of distinction in those cases involving joint liability with a case involving liability *in solido.* It is suggested by petitioner that some distinction should be made in view of *Article 2091 of the Louisiana Civil Code of 1870.*

The instant suit was filed by Mrs. Hunteman, alleging joint and concurrent negligence on the part of the two defendants, and her prayer asks for a judgment *in solido* against them. The general rule with respect to appeal is that a judgment or order dismissing an action as to less than all of several defendants jointly charged is not a final decision for purpose of appeal. *The United States v. Girault, et al.,* 11 How. 22, 13 L. Ed. 587; *Bank of Rondout v. Smith,* 156 U. S. 330, 15 S. Ct. 358, 39 L. Ed. 441; *Hohorst v. Hamburg Packet Co.,* 148 U. S. 262, 13 S. Ct. 590, 37 L. Ed. 443; *Collins v. Miller,* 252 U. S. 364, 40 S. Ct. 347, 64 L. Ed. 616; *Arnold v. Guimarin,* 263 U. S. 427, 44 S. Ct. 144, 68 L. Ed. 371; *Menge v. Warriner,* 120 Fed. 816; *Roller v. Burkett, et al.,* 156 Fed. 1023; *Bush v. Leach, et al.,* 22 Fed. (2d) 296; *Hewitt v. Charles R. McCormick Lumber Co., et al.,* 22 Fed. (2d) 925; *Atwater v. North American Coal Corp., et al.,* 111 Fed. (2d) 125.

It is interesting to note in connection with petitioner's suggestion of distinction between joint liability

and *in solido* liability that the *Menge* case, *supra*, was decided by the Fifth Circuit Court of Appeals, the case coming from the Eastern District of Louisiana.

In view of the general rule above stated, which has consistently prevailed, there seems to be no reason or cause for making any strained distinction between joint liability and liability *in solido*.

Finally petitioner suggests conflict because of exceptions to the general rule found in *Hill v. Chicago*, 140 U. S. 52, 11 S. Ct. 690, 35 L. Ed. 331, and *Collins v. Miller*, 252 U. S. 364, 370, 40 S. Ct. 347, 349, 64 L. Ed. 616, and *United States v. River Rouge Co.*, 269 U. S. 411, 46 S. Ct. 144, 70 L. Ed. 339.

These cases are easily distinguishable from the cases formulating and adhering to the general rule. To demonstrate the difference between the three last cited cases and the situation which we have in the case under argument, see the *Hohorst* case, *supra*, 148 U. S. 262, at page 264. See also *Fields v. Mutual Benefit Life Insurance Co.*, 93 Fed. (2d) 961.

The cases of *Curtis v. Connly, et al.*, 264 Fed. 650, and *Thompson v. Murphy*, 93 Fed. 38, both referred to by plaintiff in her brief at page 6, can be distinguished either because the defendants were not claimed to be jointly liable or because they fall within the exception to the general rule as exemplified by *Hill v. Chicago*, supra, and therefore

do not touch the situation which we have in the case under argument.

We submit, therefore, that in the instant case, being one in which several defendants are sought to be jointly held, the general rule as applied in the *Hohorst* and other cases cited above should apply.

Respectfully submitted,

NEW ORLEANS PUBLIC SERVICE INC.,
Respondent and Appellee.

By William W. Ogden,
of New Orleans,
Counsel for Respondent and Appellee.

Alvin R. Christovich,
of New Orleans,
of Counsel for Respondent and Appellee.